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ABSTRACT

Faculty termination criteria of community/junior colleges in Texas and Michigan were studied, and case law was researched to determine how definitive the criteria need to be and how the courts have interpreted general criteria. In Texas, 37 public two-year colleges were surveyed, with 25 replying. Of these, 11 institutions supplied policy statements that were basically a restatement of the Coordinating Board, Texas College and University System, criteria with one or two additional institutional criteria. These criteria for dismissing both a faculty member and a probationary faculty member are: (1) the demonstration of professional incompetence, (2) the demonstration of moral turpitude, and (3) the gross neglect of professional responsibilities. A list is compiled of the dismissal criteria of the 25 colleges. In Michigan, 29 public community/junior colleges were surveyed, with 20 responding. Of these 20, 7 have criteria of various degrees of specificity. The faculty dismissal criteria for these seven institutions are listed. Case law and the most common dismissal criteria are discussed from the standpoints of: legal basis for institutional development of sismissal criteria, courts' interpretation of dismissal criteria, the interpretation of case law. A case law perspective of the dismissal of nontenured faculty is then discussed as related to the rights of nontenured personnel in a termination. Finally, a case law perspective of the dismissal of tenured personnel as a response to financial exigency is presented. An annotated bibliography prepared from a computer search of ERIC materials concludes the report. (DB)

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INSTITUTIONAL RESPONSIBILITY IN THE DEVELOPMENT OF FACULTY DISMISSAL CRITERIA

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JC 730 221

DEPARTMENT OF HIGHER EDUCATION
FLORIDA STATE UNIVERSITY

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H. M. HOLDERFIELD

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August 1973

PREFACE

One of the important elements of the doctoral program offered by the Department of Higher Education at Florida State University is illustrated in this monograph. Opportunity to conduct an indepth study of real-life problems is afforded each doctoral student which all too often is impossible for the practitioner-on-the-job.

The role of the courts in the day to day operations of post-secondary institutions has expanded significantly over the past few years. That role will continue to grow during the years ahead as the growth period of the 1960's is gradually replaced by stabilization or even retrenchment. Management of educational institutions will require greater understanding of and attention to the legal framework for rendering professional decisions and judgments. The legal aspects of post-secondary education have, therefore, become an essential part of the preparation program of future administrators.

The authors of this report have been exposed to a variety of experiences designed to provide a solid background of sensitivity to the legal implications of personnel management. Both are advanced doctoral students

in the program directed toward state and regional leadership of higher education. Frank Brown recently completed an internship experience with the Alabama Commission for Higher Education. "Mac" Holderfield participated in the Annual Summer Workshop of the Southeastern Community College Leadership Program which dealt with legal implications of personnel management in the two year college. Both are recipients of a Kellogg Fellowship for students planning to pursue professional careers related to state level coordination and leadership of community/junior colleges.

The FSU/UF Center for State and Regional Leadership is supported in part by a grant from the W. K. Kellogg Foundation. Dr. James L. Wattenbarger, Director of the Institute of Higher Education at the University of Florida, is responsible for the partnership operation at his institution while I am responsible for the program of F.S.U.

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I. PURPOSE OF THE STUDY

It is clear from a random reading of various community/junior college faculty handbooks that the published criteria for the termination of faculty are, in most cases, ambiguous. Since significant words and phrases in the criteria are not clearly defined, their meaning is relative to the reader of the handbook. In recognizing the expense in time, money, and morale which community/junior colleges could experience if involved in termination litigation resulting from inadequate or obscure definitions of impermissable behavior, we undertook a systematic study of this policy issue. This study first identifies the state of dismissal criteria development among selected institutions, then cites pertinent case law relative to the most common criteria, and finally recommends guidelines for institutional criteria preparation. An annotated bibliography is also included.

Significance of the Study

Present trends seem to indicate that the forces exerting influence on American higher education in the 1970's will be quite different from those forces which shaped higher education in the 1960's. For the community/junior college movement, the 1960's were an era of rapid institutional growth. Local, state, and/or federal

appropriations were increased significantly to nurture the new institutions and to expand existing institutions. Students were anxious to enroll in the new colleges.

Now, in the 1970's, the appropriations are not as generous as they were. Enrollment patterns are stabilizing; society's attitude toward higher education is changing. In the 1960's, the student's goal was the baccalaureate, the traditional symbol of achievement in higher education. Today we are experiencing a growing student demand for more hands-on practical educational experiences, resulting in enrollment shifts toward those educational institutions (public, private, or proprietary) which can provide the best career-oriented instruction.

Another force shaping higher education in the 1970's has been the increasing role of the courts. With institutions experiencing financial, enrollment, and reorganizational stresses, a legal consciousness has developed among administrators, faculty, and students. As institutional changes are made to cope with the exigencies of our time, those changes, when they affect personnel, must be made consistent with state and federal law. Administrators, faculty, and students need to be aware of the laws which affect their behavior in the institutional setting. Administrators must be sensitive to the legal implications of their behavior since many of their actions interpret or reinforce state, board, or institutional policy.

The thrust of our research has been to examine one policy issue which is common to most community/junior colleges and which has legal implications: the issue of criteria development for faculty termination. It seems that termination problems will increase in many institutions because of enrollment stabilization or reduction, accountability, or collective bargaining; consequently, it will be essential that community/junior college administrators have a clear understanding of their criteria in dismissing faculty. It is just as important that faculty understand how the dismissal criteria can affect their behavior after they have signed their contracts.

Procedures

We undertook a systematic study of termination criteria among community/junior colleges in two states. The states were to have a variety of institutions, rural and urban, large and small. We wanted the states to reflect a difference in degree of coordination of higher education, and also to reflect different environments relative to faculty unionization. We chose to survey Texas and Michigan community/junior colleges.

The results of the survey would produce a variety of responses to the problem of policy formulation of termination criteria. In order to give these results a relevancy, we researched case law to determine how definitive

criteria need to be and how the courts have interpreted general criteria. Our study of case law included more than one hundred cases over the past thirty-five years. We have cited only those cases, however, which we believe give the best perspective as to how the case law on this issue has developed and which indicate the most recent direction of higher court rulings. After examining the survey results in light of the case law, we make recommendations for developing institutional criteria.

This paper has some definite limitations. It is not a study of tenure per se, except as tenure relates to dismissal criteria. It does not deal with the question of due process in dismissal proceedings; neither does it attempt to consider state statutes in light of court decisions.

II. THE INTERPRETATION OF THE TEXAS SURVEY

The Texas Community/Junior College System

The American Association of Community/Junior Colleges listed forty-eight of these institutions in its 1972 directory. Thirty-eight of these institutions have their own locally elected governing boards. Ten colleges are divided among four districts with the voters of each district electing a governing board for their institutions. Since 1965 the Texas public community/junior college system has been under the supervision of the Coordinating Board, Texas College and University System, which has coordinating powers for all of the state's higher education.

In 1967 the Coordinating Board, Texas College and University System, published a policy paper entitled "Academic Freedom, Tenure, and Responsibility for Faculty Members in Texas Public Colleges and Universities." The purpose of this publication was to present principles which could aid the colleges and universities of Texas in the evaluation of their individual policies of academic freedom, tenure and faculty responsibility. This publication defined the criteria for dismissing both a faculty member and a probationary faculty member with an unexpired contract as the following: (1) the demonstration of

professional incompetence, (2) the demonstration of moral turpitude, and (3) the gross neglect of professional responsibilities. Dismissal of faculty could also result from cases of bona fide financial emergency. The Coordinating Board stated that within one year each public institution in Texas should have designed its own written policy on academic freedom, tenure, and responsibility, and should have filed a copy of this statement with the Coordinating Board. Each institutional policy statement was to outline the due process procedure by which a tenured faculty member would be dismissed.

The Texas Study

In our study we surveyed thirty-seven Texas public two-year colleges; we received twenty-five replies. We requested copies of institutional tenure termination policy, including dismissal causes or criteria. Two institutions indicated they had no published criteria for the dismissal of tenured faculty. Basically, the policy statements received from eleven institutions were a restatement of the Coordinating Board's criteria with one or two additional institutional criteria. The policy statements of only four institutions attempted to define each dismissal criteria. One junior college responded with criteria less specific than the Coordinating Board's

criteria. The survey revealed that four institutions were in the process of rewriting their termination procedures; one of these four was utilizing legal counsel in preparing the dismissal criteria and due process procedure. Three responding institutions did not supply adequate information.

The dismissal criteria of the various community/junior colleges surveyed are the following:

(1) From the eleven institutions which basically adopted the principles of the Coordinating Board
   a. Professional incompetence
   b. Moral turpitude
   c. Gross neglect of professional responsibilities
   d. Bona fide financial emergency
   e. Other reasons not becoming an employee of the institution
   f. Contumacious conduct
   g. Physical disability
   h. Violation of the policy concerning academic responsibility as stated by the Board of Regents
   i. Failure to adhere to professional standards or ethics
   j. Actions not in the best interest of the college, such as incompetence or moral turpitude
   k. Refusal to comply with college policies, procedures, and administrative directives

(2) From the four institutions which attempted to define each criteria or be most specific in describing impermissable behavior
   a. Conviction of any felonious crime involving moral turpitude
   b. Drunkenness
   c. Failure to comply with official directives and/or established Board policy
   d. Physical or mental incapacity preventing performance of contract

e. Repeated and continued neglect of duties
f. Failure to comply with such reasonable requirements as the Board may prescribe for achieving professional improvement and growth
g. Willful failure to pay debts
h. Use of addictive drugs or hallucinogens other than under a doctor's care or prescription
i. Excessive use of alcohol
j. Good cause as determined by the local board, good cause being the failure of the tenured personnel to meet the accepted standards of conduct for the profession as generally recognized and applied in similar junior colleges and other educational institutions
k. Refusal to accept reasonable class assignments, or having accepted class assignments, refusal to meet such assignments
l. Extravagant and public display and/or socially reprehensible actions or attitudes which tend to discredit the faculty generally or damage its reputation
m. Abuse of the teaching privilege through diversion of student time and energy away from assigned subject matter or through unreasonable and unwarranted demands upon student time and energy which make balanced curricular efforts impossible
n. Unsatisfactory service which is defined as performance of responsibilities in a manner that is clearly below accepted standards for the professional staff of the college. Evidence of unsatisfactory service may include student evaluation, colleague evaluations, administrative evaluations and such other factors as may be relevant to the determination of the quality of an individual's contribution to the institution. Where unsatisfactory service is cited as the cause for termination, evidence must be presented indicating that:

1. The unsatisfactory service occurred repeatedly over a period of not less than one semester.

2. The unsatisfactory service was identified by an appropriate administrator at least three months prior to the date on which action was taken to initiate termination.

3. Suitable assistance was provided to correct the condition of unsatisfactory service.

4. A sufficient time period elapsed between the provision of assistance and the determination that the individual had not improved sufficiently to justify retention.

o. Neglect of duty, which is defined as failure to carry out defined responsibilities in the absence of a justifiable excuse. Where neglect of duty is cited as a cause for termination, evidence must be presented indicating that:

1. The acts identified as failure to carry out defined responsibilities occurred sufficiently often over a period of time to constitute a pattern of behavior.

2. The individual was notified in writing of his actions and was given specific guidance in the correction of the problem.

3. The individual persisted in the pattern of behavior despite the notification of subsequent guidance.

p. Physical or mental incapacity, which refers to a temporary or permanent condition which would prevent an individual from carrying out his normal responsibilities. In situations where the seriousness or nature of the condition is contested by the staff member, the opinions of at least two medical specialists, one chosen by the staff member concerned, shall be obtained and submitted as evidence. If the incapacity will result in an absence of one year or less, the staff member shall be granted a leave of absence in accordance with policy stated elsewhere in this manual.

q. Violation of professional ethics, which are defined as standards of behavior which are necessary to sustain working relationships with students and colleagues. Evidence of conviction on charges of a felony or of a misdemeanor involving behavior that would interfere with the staff member's performance of his duties, may be cited as just cause for termination.

The last four criteria, n-q, are unusually explicit in describing impermissable behavior and outlining the professional responsibility of the administrators of an institution to the faculty member who is in danger of dismissal.

Policy statements from only four institutions indicated that there existed direct relationships among faculty evaluation, administrative supervision, and considerations for retention and dismissal. The materials supplied by these institutions suggested a continuous systematic supervision and evaluation by designated administrators who also were responsible for maintaining records relative to these activities.

PART III. THE INTERPRETATION OF THE MICHIGAN SURVEY

The Michigan Community/Junior College System

The state of Michigan has a community/junior college system consisting of 29 public institutions. Four of these colleges are controlled by local school districts which also have jurisdiction over public elementary and secondary institutions.

This study, coming at this time, has taken on added significance in view of a recent (February 1973) Michigan Supreme Court case, Shaw v. Macomb County Community College, 204 NW(2d) 129(1973), in which the court held that the Teachers' Tenure Act of Michigan does not apply to community colleges in that state. Since one of the deciding factors was the differentiation between a school district and a community college district, presumably the Teachers' Tenure Act would apply to those four community/junior colleges which are controlled by school districts. These four institutions, therefore, have a statutory basis for their tenure policies. The other 25 community colleges apparently do not have this same foundation and must rely on regulations, either at the state or institutional level, to lend legality to their tenure systems.

The Michigan Survey

We surveyed 29 public community/junior colleges. Twenty institutions responded. We also requested from the Michigan Community College Association any regulations or guidelines supplied to the individual institutions concerning dismissal policy. The Association replied that no state regulations or guidelines had been developed by the Michigan State Board for Public Community and Junior Colleges, which is advisory in nature.

We received a variety of responses from the 20 institutions. Four community/junior colleges list in their handbooks or contracts "just or adequate cause" as their only criterion for termination. Seven institutions indicated that they had not developed any criteria. The policy statements of ten institutions demonstrated that they had prepared termination criteria and procedures for staff reduction in the event of budget or enrollment decreases. Seven colleges have criteria of various degrees of specifity. One institution has prepared more definitive criteria than all the other colleges. One institution replied with inadequate information.

The faculty dismissal criteria from the seven institutions which had prepared reasons for termination

of varying degrees of specifity are the following:

a. Budget curtailment
b. Physical or mental incapacity
c. Reasonable and just cause. Just cause shall consist of
   (1) inadequate performance of duty
   (2) misconduct
   (3) a gross violation of college policies
d. Just cause (not defined)
e. Falling enrollment or unforseen circumstances may bring about program reduction
f. Adequate cause
g. Actions in conflict with established policies and procedures
h. Proven guilt of crime
i. Necessary reduction of personnel
j. Financial exigencies
k. Instructional incompetence
l. Adequate cause defined as
   (1) incompetency
   (2) conviction of a felony
   (3) contributing to delinquency of a minor
   (4) gross immorality
   (5) falsification of employment application
   (6) refusal to perform duties
m. A lapse of professional integrity as defined by
   (1) inefficiency
   (2) incompetence
   (3) conviction of a felony
   (4) violation of a contract
   (5) refusal to perform duties
   (6) insubordination
n. Gross moral turpitude

The single institution which went beyond simply stating causes and attempted to define its causes submitted the following criteria:

The following will be considered as cause:

a. Instructional incompetence as determined by the evaluation procedure.
b. Neglect or refusal to perform instructional obligations as defined in the Agreement and/or Board policy.

c. Repeated violation and failure to abide by the rules and recommendations made by the employer in accordance with the Agreement and Board policy.
d. Conviction of a felony, immorality, or contributing to the delinquency of a minor.
e. Evidence of physical or mental incapacity as determined by an appropriate medical authority.
f. Conduct unbecoming an instructor as determined by the NEA Code of Ethics and Board policy.
g. Falsification of information on employment application.

Employment Termination Precedure for other than cause is as follows:

a. Whenever it is necessary to decrease the size of the staff because of insufficient funds or substantial decrease in student population, or discontinuance or retrenchment of areas of curriculum, the Board of Trustees, upon recommendation of the President and the President's Advisory Council, may cause the necessary staff to be placed on leave of absence without pay... The instructor will receive a minimum of sixty days notice of change in status...
b. The following will be considered in the termination of an instructor: length of service and academic qualification in terms of educational needs will be the criteria for the retention or termination of the instructor.

Influence of Collective Bargaining

Our survey did not produce a sufficient amount of data which would allow us to make any generalizations about the effect of unionization upon the development of termination criteria. However, three institutions which have policies to accommodate faculty reduction when their budgets or enrollments decline indicated that they have included in their collective agreements a clause

which requires "consultation" with the bargaining agent in planning staff reduction. In one reported agreement, the regular grievance procedures are waived when a faculty termination case is appealed; the case is then submitted to binding arbitration.

IV. CASE LAW AND THE MOST COMMON DISMISSAL CRITERIA

Legal Basis for Institutional Development of Dismissal Criteria

In general, the legal framework for providing tenure to faculty in public institutions or systems of education is three-tiered. On the first tier the legislature, the source of authority in the public domain, enacts statutes which give general definition to tenure. These statutes also give administrative authority to the second tier, the State Board of Education or possibly in the case of the post-secondary sector, a state board of higher education. On the second tier, the board enacts regulations or standards, producing a set of general policies to be followed throughout a state or system. On the third tier the local board of trustees or, in cases where local systems or institutions are directly under the control of a state board, the local administrators will develop the most detailed criteria and procedures for professional decision-making. This description of the legal framework is somewhat idealistic, since many local boards and administrators do not develop any detailed criteria or procedures relating to the termination of tenured faculty upon which professional decisions can be made.

Many times the local board or institution adopts the general policy statement of its state board and then becomes involved in a court case when its professional judgement for termination is ambiguous or inadequately defined.

Courts' Interpretation of Dismissal Criteria

The purpose of this part of the study is to reveal the courts' definitions of the three most general and most common dismissal criteria found in the policy statements of the surveyed community/junior colleges. These criteria are the following: (1) immorality or moral turpitude, (2) neglect of duty, and (3) incompetency. The great number of cases which relate to these topics, primarily reflect litigation at the secondary educational level. Only a small percentage of cases relate directly to a community/junior college personnel problem. However, the cases at the secondary level are frequently cited as precedent in the cases which do concern the community/junior college.

Immorality

"Immorality" is cited in the statues and court decisions as one of the most common criteria for teacher dismissal. It is a term which is difficult to interpret as a legal cause for dismissal.

Bouvier's Law Dictionary defines immorality as "that which is contra bonos mores" or against sound morals.[1] Corpus Juris Secundum cites "conduct inconsistent with moral rectitude."[2] This definition was derived from Horosko.[3] From the Schuman case comes this agreement with Bouvier's "that which is contra bonos mores."[4]

The early Horosko case outlines the special moral responsibility of the teacher:

> It has always been the recognized duty of the teacher to conduct himself in such a way as to command the respect and goodwill of the community though one result of the choice of a teacher's vocation may be to deprive him of the same freedom of action enjoyed by persons in other vocations. Education people have always regarded the example set by the teacher as of great importance . . . (immorality is) . . . a course of conduct which offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and to elevate.[5]

The courts have given a broad definition to immorality. Immorality as a cause for dismissal includes sexual misconduct, but is not limited to it exclusively.[6]

> Immorality is not necessarily confined to matters sexual in nature; it may be that which is contra bonos mores, or not moral, inconsistent with rectitude, purity, or good morals; contrary to conscience or moral law; wicked, vicious; licentious, as an immoral act of man. Its synonyms are: corrupt, indecent, depraved, dissolute; and its antonyms are: decent, upright, good, right. That may be immoral which is not decent.[7]

Proof that a school teacher obtained his position by falsifying his records constituted proof of "immorality" within the meaning of the statute providing for suspension and dismissal of a teacher for various grounds, including immorality.[8]

Many cases do concern the defining of "immorality" as to indicate sexual misconduct.

> . . . findings that permanent teacher at junior college had cohabited with former student and that teacher did not believe in good faith that former student's Mexican divorce as valid or that teacher's and former student's Mexican marriage was valid warranted dismissal of teacher on grounds of immoral conduct and evident unfitness for service.[9]

In the dismissal of a school bus driver accused of adultery, the question was whether the school board had discretionary authority to so dismiss a tenured employee. It was ruled to be within the board's authority to rule whether adultery constituted immorality as set forth as grounds for dismissal.[10]

There are examples of the term "immorality" being applied to general conduct:

> whatever else the term "immorality" may mean to many it is clear that when used in a statute it is inseparable from conduct . . . It must be considered in the context in which the legislature considered it, as conduct which is hostile to the welfare of the general public; more specifically in this case, conduct which is hostile to the welfare of the school community.[11]

The courts have not been opposed to going outside the field of education to secure precedent definitions of immorality or moral turpitude. The Sullivan case provided this statement: "Many cases involving unprofessional conduct on the part of attorneys at law have branded the acts committed as involving moral turpitude, even though the acts did not relate to sexual matters.[12]

Referring to the Sullivan case in another "immorality" case, the court said:

> We see no reason why the same reasoning (Sullivan) should not apply to a charge of immoral conduct made against a teacher . . . Conduct can be immoral for the purpose of Education Code sections permitting suspension for "immoral conduct", even though it has no relationship to sexual offense; and falsifying attendance for purpose of securing continued employment and defrauding state and district would constitute such conduct on part of teacher.[13]

Immoral conduct alone might not be enough to bring about dismissal proceedings in some situations. The California Supreme Court held that immoral conduct cannot be the basis for removal of a teacher unless that conduct indicates the teacher is unfit to teach.[14]

Two teachers in Alaska were dismissed for immorality when they attempted to solicit the support of their peers in an attempt to oust the superintendent of schools. The Supreme Court of Alaska chose to use a broad

definition of immorality: " . . . is defined as conduct of the person tending to bring the individual concerned or the teaching profession into public disgrace or disrespect."[15] The two teachers were dismissed and this interesting concept of immorality was set forth.

The Alaska Supreme Court, however, while upholding the dismissal, ventured the opinion that the term "immorality" could represent a stigma when attached to the dismissal of a teacher and suggested the following action:

> The designation of immorality whould be removed from the catch-all definition of conduct and a designation of "conduct unbecoming a teacher" be substituted. The definition would then cover immorality in all of its aspects, including all shades of unacceptable social behavior and would continue to serve the useful purpose of a "catch-all" phrase which so many states have found to be a necessity in this area of legislation.[16]

Vulgarity may rise to the level of immorality and can have a bearing on the fitness of a teacher to teach in a junior college:

> Evidence that a junior college teacher removed the school public address system loud speaker from classroom and used vulgar gesture and vulgar language during class constituted a substantial basis for trial court's determination that charges of immoral conduct and evident unfitness for service were true and constituted cause for dismissal.[17]

In this case, many separate incidents, by themselves vulgar or in bad taste, collectively were thought by the court to be cause for dismissal.

Neglect of Duty

Bouvier's Law Dictionary defines "neglect" as "To omit, as to neglect business, or payment, or duty, or work. It does not generally imply carelessness or imprudence, but simply a lack or omission to do or perform some work, duty, or act."[18]

A California court declined to define "neglect of duty" as a stand-alone term: " . . . 'neglect of duty' as used in statute governing grounds for dismissal of state employees remains abstraction until viewed in light of facts surrounding particular case."[19]

The Louisiana Court of Appeal ruled that tardiness and absenteeism constituted neglect of duty:

> . . . teacher's tardiness on 73 days and absence of 17 days during school year which consisted of 180 school days, for which no excuse was made constituted wilful neglect of duty or incompetency within statute giving school board authority to dismiss teacher.[20]

In People v. McCaughan the California Supreme Court gave this opinion: "The phrase 'neglect of duty' has an accepted legal meaning. It means an intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty."[21]

Neglect of duty was construed to apply to a quite different case in Louisiana. A teacher was accused of making a vulgar remark to the principal (it might be significant that the principal was a female and the teacher a male) which was overheard by other teachers and students. The court ruled that the subsequent dismissal was proper: " . . . teacher is duty-bound to obey the orders of and to display respect for the principal at all times. And, certainly, the failure to do so by making the remark that was made by the plaintiff in this instance constitutes a wilful neglect of duty."[22]

Incompetency

Bouvier's Law Dictionary defines "incompetency" in a single statement as a "lack of ability or fitness to discharge a required duty." Corpus Juris Secundum defines the word as "a relative term without technical meaning but having common and approved usage." Corpus Juris Secundum describes twelve usages of the word which have emerged from case law. These usages include "lack of physical and mental attributes," "want of qualification," "carelessness in disposition or temperament," "disqualification," "inability," and "lack of fitness."[23]

In a California case, the court accepted incompetency to mean that there were grounds for a teacher's dismissal when there was sufficient evidence to show

that the mental condition of the teacher rendered him unfit to instruct or to associate with children. Consequently, it seems that mental competency could be a requisite for being employed as a teacher.[24]

The courts ruled in a Pennsylvania case that a public school teacher's refusal to answer his school superintendent's questions concerning his affiliation with the Communist Party constituted incompetency. The court ruled, "We find no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. The Board dismissed Beilan for incompetency, not for disloyalty."[25]

In a second case where a teacher refused comment when questioned about earlier connections with the Communist Party, a district board tried and failed to dismiss the teacher on grounds of incompetency. The court ruled the teacher was correct in claiming protection under the Fifth Amendment since the questions were asked before a Congressional Committee. The teacher was not incompetent by this act, and the dismissal deprived the teacher of due process of law and violated his rights under the Fourteenth Amendment.[26]

Four of the cases related to the professional accountability of a tenured teacher. In all these cases "incompetency" and "inefficiency" were used synonymously.

In a Kentucky case, a board removed a teacher describing her as inefficient due to her extreme age, teaching method, manner of grading, and poor rapport with her students. The courts supported the removal of an Ohio teacher because of incompetency exemplified by being uninspiring in the classroom, making no contribution to school activities, maintaining poor classroom order, and attracting bitter criticism from parents and students year after year. A New Jersey court ruled that "a teacher is guilty of 'gross inefficiency' when his efforts are failing to an intolerable degree to produce the effect intended so that he is a manifestly incompetent or incapable person." Discipline problems prompted a board to dismiss another Kentucky teacher for incompetency. The board dismissed Guthrie for reasons of "incompetency" and "inefficiency" because she was unable to control her pupils on the playground, and her students were unhappy, tense, and ill at ease. She had been transferred five times, and each time parents had demanded her dismissal.[27]

The definition of incompetency was given a broad interpretation in a 34 year old Pennsylvania case. The court ruled that "if the alleged facts were true that the school teacher commanded neither the respect nor good will of the community, and if it were true that the

condition was a result of the teacher's conduct, the evidence was conclusive of the teacher's incompetency." The court also ruled that incompetency could mean a "general lack of capacity of fitness or the lack of special qualities required for a particular purpose."[28]

A pregnant school dental hygenist, covered by Pennsylvania's Teacher Tenure Act, was dismissed becuase of her "lack of physical ability to perform duties incident to employment." A court supported this dismissal, ruling that her "incompetency" warranted her discharge under the state's Teacher Tenure Act.[29]

In a Louisiana case a teacher was dismissed for "incompetency and willful neglect of duty" when he refused to allow supervisory personnel to enter his classroom to help him in improving his instruction. The parish board provided regulations for supervising teachers when it was deemed necessary by administrators. The court ruled the following:

> "incompetency as a ground for suspension and removal has reference to any physical, moral, or intellectual quality, the lack of which incapacitates one to perform the duties of his office. Incompetence may arise from gross ignorance of official duties or gross carelessness in the discharge of them. It may also arise from lack of judgment and discretion or from a serious physical or mental defect not present at the time of election."[30]

In a second Louisiana case, a court supported the termination of a teacher on grounds of incompetence when he had been tardy to work on 73 days and absent from work 17 days during a school year of 180 days.[31]

Of the cases described, the one case in which the court developed the broadest definition for incompetency was Beilan v. Board of Public Education of Philadelphia. The U. S. Supreme Court stated a variety of definitions, some of which were pulled from earlier cases, dictionaries, and encyclopedias. The court defined incompetency in the following manner:

> "The term 'incompetency' has a common and approved usage. The context does not limit the meaning of the word to lack of substantive knowledge of the subjects to be taught. Common and approved usage give a much wider meaning . . . A relative term without technical meaning . . . It may be employed as meaning disqualification; inability; incapacity; lack of ability; legal qualifications; or fitness to discharge the required duty . . . want of physical, intellectual, or moral ability; insufficiency; inadequacy; want of legal qualifications of fitness . . . General lack of capacity of fitness, or lack of the special qualities required for a particular purpose."[32]

In an Alabama case the court ruled that simply to dismiss a tenured teacher by stating that she was incompetent was not sufficient cause for termination. The court stated that "incompetence is generic . . .

(it) conveys no information of omission or commission." The teacher was entitled to a "fair statement of charges that she was incompetent."[33]

Summary

The cases cited illustrate considerable range in definition of these three common criteria. The courts' interpretations of definitions of immorality or moral turpitude include "setting a bad example," "falsifying records," "conduct bringing the teaching profession into public disgrace," and "sexual misconduct." Neglect of duty was considered "tardiness and absenteeism," "intentional failure of performance of duty," and "vulgar remarks made to a superior."

The search for the most important cases relating to incompetency produced twelve cases with six different aspects of the definition. The varieties of incompetence were "unfit mental condition," "refusal to answer questions of superiors," "refusal to be accountable for instruction," "lack of respect by community for teacher," "absent and tardy," and "lack of physical ability."

The Interpretation of Case Law

The use of case law in developing dismissal criteria has certain limitations. The cases cited in this study are the most highly visible cases, most often cited as

precedent in litigation concerning the dismissal issues we are examining. However, case law will reflect different philosophies of different courts in different regions of the nation. One cannot be certain that the case law precedents set outside one's judicial region will affect the solution of a local problem unless the case law emerges from the United States Supreme Court. In general, the different courts, state and regional, do attempt to maintain varying degrees of national perspective in their interpretations of law. A California Appeals Court may consider case law produced by the Louisiana Appeal Court and so forth. There is no guarantee that any given case will be accepted as precedent by any given court.

A second limitation of the use of case law is the consideration one must give to the passage of time and the changing of societal values and attitudes. The courts will reflect these changes. The Horosko case of 1939 is frequently quoted in the literature because of the court's efforts to define conduct impermissable for a teacher. However, it is doubtful a teacher could be dismissed today on the basis of serving beer in her husband's tavern and playing a pinball machine which then constituted immoral conduct. Consequently, one must examine a particular principle in case law and be aware of contemporary social norms.

The study of case law does reflect a particular concern of the courts from many regions of the nation. The courts hesitate to overrule or exert jurisdiction over legally constituted agencies. The courts' role is to determine whether or not the action of the agency is in accordance with the authority and formalities of statute. The courts do not wish to review the wisdom, reasoning or judgment of an administrative agency. In those cases where administrative agencies, such as local college boards and administrations, have not developed clearly defined contractual relationships with their faculty, the courts have had the responsibility of developing functional definitions for the issues under litigation.

Many cases illustrate the courts' reluctance to invade the area of professional responsibility of the local board and administration. The courts will seek to exhaust the definitions in Teacher Tenure Laws as well as state and institutional policies before they will construct their own definitions. In Applebaum the court expressed its role when it stated that "Courts are not to weigh evidence of hearings but are to determine whether it was fairly produced . . . that it was directed to proof of charges filed; and that the proceedings were free from arbitrary, oppressive, unreasonable, or fraudulent conduct." The Guthrie case illustrates a

court's appreciation of the judgment of professional educators. The court expressed its concern with professional standards of education and affirmed the board's termination of Guthrie because of the "experienced professional" testimony against Guthrie.

The courts have been critical of ambiguous statements of tenure. They have criticized criteria as being unclear; by which faculty behavior was evaluated; one court referred to its state's tenure objectives as "a fog of nebulous verbiage." Another court implied its state's tenure dismissal criteria were obscure when they stated that "lack of cooperation and insubordination are gross conclusions and therefore do not in fact constitute a statement of the reason of dismissal."

The search into case law indicates that the courts seek more detailed definitions of dismissal criteria than are given in many termination policy statements. The study indicates that trustees or administrators at the institutional level should develop dismissal criteria which are reasonable, clear, and consistent with professional values and at the same time are consistent with judicial decisions and state statutory objectives.

FOOTNOTES

[1]Bouvier's Law Dictionary, Vol. 1, 3rd Edition, p. 1495.

[2]Corpus Juris Secundum, Vol. 42, p. 396.

[3]Horosko v. School District of Mt. Pleasant, 6 A(2d) 866(1939).

[4]Schuman v. Pickert, 269 NW 152(1936).

[5]Horosko v. School District of Mt. Pleasant, 6 A (2d) 866(1939).

[6]Board of Education v. Weiland, 4 Cal Rptr 286(1960); Sarac v. State Board of Education, 57 Cal Rptr 69(1967).

[7]Schuman v. Pickert, 269 NW 152(1936).

[8]Negrich v. Dade County Board of Public Instruction, 143 S(2d) 498(1962).

[9]Board of Trustees of Mt. San Antonio Junior College District of Los Angeles County v. Hartman, 55 Cal Rptr 144(1966).

[10]Stewart v. East Baton Rouge Parish School Board, 251 S(2d) 487(1971).

[11]Jarvella v. Willoughby-Eastlake City School District Board of Education, 233 NE(2d) 143(1967).

[12]Sullivan v. State Bar, 344 P(2d) 304(1959).

[13]Board of Education v. Weiland, 4 Cal Rptr 286(1960).

[14]Morrison v. State Board of Education, 461 P(2d) 375(1969).

[15]Watts v. Seward School Board, 421 P(2d) 586(1966).

[16]Ibid.

[17]Palo Verde Unified School District of Riverside County v. Hensey, 88 Cal Rptr 570(1970).

[18]Bouvier's Law Dictionary, Vol. 2, 3rd Edition, p. 2312.

[19]Gubser v. Department of Employment, 76 Cal Rptr 577(1969).

[20]Ganderson v. Orleans Parish School Board, 216 S(2d) 643(1968).

[21]People v. McCaughan, 317 P(2d) 974(1957).

[22]Moffett v. Calcaieu Parish School Board, 179 S(2d) 537(1965).

[23]Bouvier's Law Dictionary, Vol. 1, 3rd Edition, p. 1528; Corpus Juris Secundum, Vol. 42, p. 539.

[24]Board of Education of San Francisco Unified School District v. Mulcahy, 123 P(2d) 114(1942).

[25]Beilan v. Board of Public Education of School District of Philadelphia, 78 SCt 1317(1958).

[26]Board of Education School District of Philadelphia v. Angellina Intille, 163 A(2d) 420(1960).

[27]Hapner v. Carlisle County Board of Education, 205 SW(2d) 325(1947); Appelbaum v. Wulff et al., 95 NE(2d) 19(1950); Conley v. Board of Education of City of New Britain, 123 A(2d) 747(1956); Guthrie v. Board of Education of Jefferson County, 298 SW(2d) 691(1957).

[28]Horosko v. School District of Mount Pleasant Township et al., 6 A(2d) 866(1939).

[29]Appeal of School District of City of Bethlehem, 32 A(2d) 565(1943).

[30]Tichenor v. Orleans Parish School Board, 144 S(2d) 603(1962).

[31]Ganderson v. Orleans Parish School Board, 216 S(2d) 643(1968).

[32]Beilan v. Board of Public Education, 78 SCt 1317(1958).

[33]County Board of Education of Clark County v. Oliver, 116 S(2d) 566(1959).

V. A CASE LAW PERSPECTIVE OF THE DISMISSAL OF NONTENURED FACULTY

Such a broad topic as the case law study of the dismissal of nontenured faculty has many ancillary issues, such as the courts' definitions of property, burden of proof, liberty, and subjective and objective expectancy. Our focus on this topic will concern the rights of the nontenured personnel in a termination. By recognizing these rights the local board and administration will be able to prepare the most effective dismissal criteria.

Having referred to some thirty recent cases, we conclude that until the summer of 1972 when the Supreme Court delivered its rulings on Perry v. Sinderman[1] and Board of Regents v. Roth[2], case law relative to the dismissal of probationary faculty was developing in at least three different directions. One set of decisions would give the faculty member due process regardless of the circumstances of dismissal; a second set of cases would allow the nontenured teacher no recourse unless his First or Fourteenth Amendment rights were infringed upon; and a third group of cases would give the teacher due process only if a Constitutional freedom was involved or if the instructor had an expectancy to employment. The two recent Supreme Court decisions will cause a regrouping of cases in the future,

since they laid to rest some of the conflicting ideas that had developed recently among the Circuit Courts.

Historically, the nontenured or probationary teacher has had an employment expectancy which followed the master-servant rule that ". . . absent statutory or contracted provision to the contrary, an employer enjoys an absolute power of dismissing his employee, with or without cause."[3] Historically, dismissal cases of nontenured faculty fall into two categories: (1) The teacher alleges the dismissal results from his exercise of his constitutional rights, or (2) he alleges his dismissal is arbitrary, capricious, unfair, etc. The circuit courts have had no difficulty being consistent in rendering decisions where Constitutional rights are concerned, but in the second type of case the lower courts are not consistent as to what are rights and remedies.[4]

In order to understand the earlier confusion of the case law, it might be best to begin by examining the recent Supreme Court decisions, Perry and Regents v. Roth and then unravel the major case law from the present back for five years. The Supreme Court ruled in Perry that Sinderman's maintaining that he was not rehired in a particular job did not amount to loss of liberty or property such as would entitle him to the protections of due process. The Court of Appeals had asserted that he had the right of due

process because he charged that the college officials dismissing him had infringed upon his constitutionally protected rights. The Supreme Court rejected this approach and stated:

> "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and at that time he may invoke at a hearing." . . . The teacher "did not show that the decision not to rehire him somehow deprived him of an interest in employment, despite the lack of tenure or formal contract . . . We disagree with the Court of Appeals insofar as it held that a mere subjective expectancy is protection by procedural process. The existence of rules, understandings, promulgated and fostered by state officials, may justify his legitimate claim to continued employment."[5]

Sinderman was able to show an "objective expectancy" to employment by using state, not institutional regulations, to illustrate that he was covered by a form of state tenure. He would receive his hearing because of the state regulations which did demonstrate his property rights and required due process before he could be relieved of that interest.

In Regents v. Roth the Supreme Court reversed the judgment of the Court of Appeals and ruled that where the state declined to rehire Roth and did not make any charges against him that might damage his standing in the community, then the state imposed no disability on him that infringed on his liberty.

The Supreme Court further ruled that "to determine whether due process requirements apply in the first place, the court must look not to the weight but to the nature of the interest at stake and must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." In clarifying the definition of property the Court stated "that to have a property interest in a benefit, a person must have more than an abstract need or desire for it or a unilateral expectation of it, he must have a legitimate claim to it." Consequently, the Fourteenth Amendment's protection of property is a safeguard of interest a person has already acquired in specific benefits. Roth did not have statutory protection or a legitimate claim to employment. There was no sufficient reason for the university to give him a hearing.[6]

To summarize the Supreme Court's two decisions, it seems that the nontenured instructor has no rights to due process unless constitutional rights (especially First Amendment rights) are infringed upon; and the instructor cannot claim expected employment as a property right unless some state employment regulation, institutional written policy, or oral expressions from institutional officials have produced that expectancy. If a state's statutes allow or provide for the probationary period and if the instructor is terminated and his "good name, reputation, honor,

or integrity is at stake because of what the government is doing to him, then notice and an opportunity to be heard are essential."[7] Otherwise, it seems that he has no recourse.

In order to comprehend the relevance of these two decisions, it would be worthwhile to examine the development of case law in the lower courts during the past few years. In at least a dozen cases the courts have held that the nontenured teacher had neither a right to due process nor a "subjective expectancy to employment" which would call for a hearing in the termination. Of course, the courts recognized due process as a protection for the nontenured instructor if his Constitutional rights were denied, specifically the First Amendment rights. These courts were not sympathetic to the property right arguments based in the Fourteenth Amendment and Section 1983 of the 1871 Civil Rights Act.[8] In these cases the courts frequently alluded to the broad discretionary powers needed by a school board or institution in selecting its tenured faculty.

A second set of earlier cases reflected the courts' approved use of due process in almost any contested termination situation. In Shirck v. Thomas the court held that the teacher was not only entitled to a statement of reasons for dismissal but even to the notice of a hearing at which the burden of proof would be on the administration. In

Gouge v. Joint School District the court ruled the teacher was entitled to statements of reason and hearing even though the state's law allowed dismissal with or without cause. From the Roth v. Regents case, which was later overruled, came the following statement: "The time is past when public employment can be regarded as a privilege which may be extended upon any conditions which public officials may choose to impose." The court held in that case that it was unjust to expose Roth to dismissal without reason. Out of Sinderman v. Perry came a loose definition of expectancy of reemployment favoring the teacher which would justify due process in that instance. Subsequently the Supreme Court tightened up the definition.[9]

In a third group of past cases, the courts cautiously followed state laws and did not attempt to make any new laws themselves. In general, state law provided for the termination of probationary or nontenured faculty, and the court's only interest was to see that the law had been obeyed: to see that the instructor was given whatever process the law afforded.[10]

In a fourth set of three cases, the courts were concerned with expectancy and right to employment. In Pred v. Board the court held that:

> "Expectancy of continual employment is an interest which the law will protect . . . The stock

> reflex that there is no right to public employment and here no right to a merit-based continuing contract has over the decade been rejected time and time again . . . To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminating terms laid down by the proper authorities."

Expectancy was evidenced by oral statements and procedure outlined in the faculty handbook in the Green v. Howard University case. In Lucas v. Chapman the court ruled that Lucas' eleven years of employment gave him necessary expectancy of employment. Once the faculty member has a right to employment or expectancy of reemployment, then he has due process during his dismissal.[11]

Two cases which do not fit well into the above three categories must be examined one their own merits. From the Ferguson v. Thomas decision came the ruling that:

> "If a college instructor, who is to be terminated for cause, opposes his termination, minimal procedural due process require that he be advised of cause or causes for his termination in sufficient detail to enable him to show error, that he be advised of names of testimony witnesses against him, that at reasonable time after such advice, he be accorded meaningful opportunity to be heard in his own defense, and that hearing be before a tribunal that both possesses academic expertise and has apparent impartiality toward charges . . . If no established procedures exist in the college in affording minimal procedural due process . . . (it) may adopt any method that is adequate."[12]

The central item in this case was that there existed a one-year contract situation for all employees at Ferguson's institution. The absence of tenure policy, the yearly contracts, and Ferguson's years of employment gave him the benefit of due process.

The special little twist that Drown v. Portsmouth School District contributed to the case law was the decision that the nontenured instructor was not necessarily entitled to a hearing but he was entitled to a written explanation of reasons for dismissal as well as to access to his evaluation reports in his personnel file. The court did not consider this to be a case on a constitutional question but expressed concern for the teacher to have the knowledge to make self-improvements.[13]

Harry W. Pettigrew summarized well the most recent trends in case law development prior to Perry and Regents v. Roth when he wrote:

> "As the courts more clearly articulate constitutional principles of procedural due process and recognize that even sincere administrators are often arbitrary, they are becoming more dubious of the academic administrator's assertion that the esoteric relationship between the administrator and the teacher should not be subject to judicial review . . . This trend is evidenced by the increasing number of cases in which the courts are recognizing the teachers right to Fourteenth Amendment procedural due process protections."

The implication of these statements is that the institution should provide the nontenured faculty with procedural due process in order to stop the march on the courts by the teachers. The courts should be the last resort, not the first.[14] This summary is not consistent with the Supreme Court's ruling in Perry where it maintained that where no formal or de facto tenure system existed the teacher had no interest requiring a hearing, excluding the infringement of a Constitutional right.[15]

FOOTNOTES

[1]Perry v. Sinderman, 92 S Ct 2694(1972).

[2]Board of Regents v. Roth, 92 S Ct 2701(1972).

[3]James T. Flaherty, "Probationary Teachers and the Expectancy of Continued Employment," Cleveland State Law Review, XX (September, 1971), 533. Hereinafter cited as Flaherty, "Probationary Teachers."

[4]Marc A. Levinson, "The Fourteenth Amendment, Fundamental Fairness, the Probationary Instructor and the University of California--an Incompatible Foursome?" University of California, Davis Law Review, V(1972), 622.

[5]Perry, Jeffery Herschman, "Constitutional Problems in the Nonretention of Probationary Teachers," University of Illinois Law Forum, 1971, 204.

[6]Board of Regents v. Roth, 92 S Ct 2701(1972).

[7]Ibid.

[8]Tichon v. Harder, 438 F(2d) 1376(1971); Fluker v. Alabama State Board of Education, 441 F(2d) 201(1971); Orr v. Trinter, 444 F(2d) 128(1971); Foodew v. Board of Governors, 272 NE(2d) 497(1971); De Canio v. School Committee of Boston, 260 NE(2d) 676(1970); Thaw v. Board of Public Instruction of Dade County, 432 F(2d) 98, 100 (1970); Schultz v. Palmberg, 317 F(Supp) 659(1970); Freeman v. Gould, 405 F(2d) 1139(1965); Jones v. Hooper, 410 F(Supp) 1323(1969); Raney v. Board of Trustees, 48 Calif Rptr 55(1966).

[9]Shirck v. Thomas, 447 F(2d) 1025(1971); Gouge v. Jointer School District, 310 F(Supp) 984(1970); Roth v. Board of Regents, 310 F(Supp) 972(1970); Sinderman v. Perry, 430 F(2d) 939(1970).

[10]Henson v. City of St. Francis, 322 F(Supp) 1034 (1971); Dunham v. Crosby, 435 F(2d) 1177(1970); Freeman v. Gould, 405 F(2d) 1135(1969); Ishimatsu v. Regents, 72 Calif Rptr 758(1968).

[11]Lucas v. Chapman, 430 F(2d) 945(1970); Green v. Howard University, 412 F(2d) 1128, 1135(1969); Pred v. Board, 415 F(2d) 851(1969); Green v. Howard University, 271 F(Supp) 609(1967).

[12]Ferguson v. Thomas, 430 F(2d) 852(1970).

[13]Drown v. Portsmouth School District, 435 F(2d) 1182(1970).

[14]Harry W. Pettigrew, "Constitutional Tenure: Toward a Realization of Academic Freedom," Case Western Reserve Law Review, XXII (April, 1971), 508.

[15]Perry, Jeffery Herschman, "Constitutional Problems in the Nonretention of Probationary Teachers," University of Illinois Law Forum, 1971, 204.

VI. A CASE LAW PERSPECTIVE OF THE DISMISSAL OF TENURED PERSONNEL AS A RESPONSE TO FINANCIAL EXIGENCY

At present there is a dirth of case law on dismissal based upon financial exigency directly applicable to the two-year college. Most case law relates to personnel problems at the elementary or secondary level. Many of these cases concern enrollment reductions which necessitate the dismissal of faculty. Some cases concern personnel problems arising out of the consolidation of school systems. The case law does indicate how an institution should approach the problem of developing criteria for this type of termination, however.

The question of faculty dismissal when changes occur in enrollment is not a new issue. Over thirty years ago, the Minnesota Supreme Court upheld the right of a board to discontinue teachers because of lack of pupil enrollment: ". . . Our teachers should be the first to recognize that the tenure law was not intended as a guarantee of continuous employment . . . regardless of whether the number of pupils or availability of positions justifies their continued employment . . . Theirs is still an employment affected by a public interest; . . . the statute does not prevent their discharge when the purpose for which they were employed ceases."[1]

One court stressed in 1963 that a tenured teacher could not be automatically dismissed, even when his position is abolished. A permanent teacher is not automatically removed from school employment by honest discontinuance of his office but should be placed in a position of equal standing to that formerly held, if it is possible, and in any event he is entitled to salary attributable to the status he attained even though he is re-employed in a position of lesser rank. In the absence of specific cause of a personal nature to terminate the services of a tenured teacher, it must be shown affirmatively that there was no position available which the teacher was qualified to fill.[2]

There is also the question of at what level an enrollment decline can occur and affect a staff reduction. A Delaware court rejected a plea that reduction in enrollment, as indicated by statute, meant reduction for the whole school rather than for a particular department. The court ruled that increased enrollment in commercial subjects would not justify retention of music teachers, in whose department enrollment had declined.[3]

The principle that tenured teachers may be dismissed where their services are no longer needed has been extended to situations embracing both the consolidation of schools and the abolition of an entire department in a school.

"Statutory authority of school boards to dismiss teachers for cause includes power to dismiss teachers for lack of teaching positions due to consolidation of school districts."[4] When school districts are consolidated, the question arises as to the continuation of tenure status acquired in the former separate districts. The inquiry is whether the new district is a continuation of the old districts or a new entity, insofar as tenure is concerned. The Supreme Court of New Mexico held that for tenure purposes the consolidated district was a continuation of the former districts comprising it;[5] the Supreme Judicial Court of Maine held to the contrary.[6]

When the decision is made to dismiss a faculty member, the question arises as to whether or not the need to reduce staff might legitimately be used as an opportunity to eliminate less competent or effective teachers from the faculty. In the selection of the teacher or teachers to be dismissed upon a reduction in the number of teachers employed and in the absence of any express statutory basis for such selection, the courts have held that a board cannot dismiss a tenured teacher and retain a nontenured teacher, at least where the nontenured teacher is retained to teach in the same position or in the same general area of competence, interest, and training as the tenured teacher.[7]

In one case, where by statute an employment contract with a teacher on continuing service status could be cancelled by reason of justifiable decrease in the number of teaching positions, the plaintiff was dismissed on that provision. The county board of education retained the services of four teachers who had not obtained continuing services status, but who qualified to teach in the same grades as the plaintiff. The board contended that the teachers retained held certificates of a higher grade than the plaintiff, and that the cancellation of the plaintiff's contract was in line with the board's established policy of increasing the level of qualifications of the teachers in the school system. The court affirmed the order of the trial court which had ordered the board of education to return the plaintiff to an active full-time teaching status. The court held that the contract of a teacher who had obtained continuing service status could not be cancelled because of a justifiable decrease in the number of teaching positions when there was retained by the board of education a teacher who was qualified to teach in the same position but who had not obtained continuing service status.[8]

In a Delaware case, the court held that the school board could not under the authority of a statute authorizing termination at the end of the school year by reason of

a reduction in the number of teachers required as a result of decreased enrollment or a decrease in education services, dismiss the plaintiff who had tenured as a music teacher while retaining a nontenured teacher in the music department.[9]

Where, in order to effect a reduction, the teacher to be dismissed must be selected from a group of tenured teachers and all are qualified to perform the available teaching duties, in the absence of any statutory basis, the board may exercise its discretion in making selection, and it may consider noneducational factors as well as educational ones. The following cases support this proposition.

Where the county board of education cancelled the plaintiff's contract based on a statutory provision authorizing employment cancellation of a teacher who had attained continuing service status, on the ground of a justifiable decrease in the number of teaching positions, the court held that once it was established that the board cancelled the plaintiff's contract on the statutory grounds, the reason for selecting the plaintiff's contract as the one to be cancelled was not open to inquiry. Stating that there was nothing in the tenure act establishing a criterion for determining what particular tenured teacher's contract should be cancelled, the court concluded

that in such a situation the right of selection was a matter resting entirely with the employing board.[10]

In a similar case where it was held that tenured teachers had been properly dismissed upon the statutory ground of a justifiable decrease in the number of teaching positions, the court pointed out the county board had considered it necessary to cancel the plaintiffs' contracts in effecting a reduction in teachers. The mere fact that teachers retained were of less service or were receiving less compensation was not, of itself, arbitrary action against the plaintiffs. Noting that of necessity much must be left to the discretion of the board, the court stated that all legal arbitrations would be indulged in the favor of the orders of such a board, and that those orders would be upheld unless their invalidity was clearly shown by those who challenged them.[11]

In a case with racial discrimination overtones, the U.S. Court of Appeals, Fifth Circuit, ruled that the selection of teachers to be dismissed was required to be on the basis of objective and reasonable nondiscriminatory standards from among all the staff of the school district.[12]

Where seniority was established as the statutory basis for the selection of the particular teacher or teachers to be dismissed and "where one tenured teacher has greater seniority, within the category contemplated by

the statute, than another teacher, the fact that the teacher with the greater seniority is not legally qualified to perform the teaching duties of the teacher with less seniority will not necessarily operate to bar the retention of the teacher with the greater seniority." It has been held that under these circumstances the school board, in order to effectuate the seniority provision of the statute, must attempt to realign the teaching staff so as to provide for the retention of teachers in accordance with their seniority. Otherwise, said the court, the seniority rights of teachers could be circumvented by the expedient of reassignment of teachers so that there would be no teachers with fewer continuous years of service teaching subjects which the suspended teacher was qualified to teach, and obvious inequities would result.[13]

Courts seem generally to agree that the local board has the authority to make determinations as to when personnel shall be dismissed and on what grounds and even to the matter of how they are to be selected. Although other statutory sources of power may exist, school boards, regardless of the statute, have an affirmative duty to scrutinize teachers to insure competence of instruction.[14]

In McLain v. Board of Education the court ruled: "It is recognized in law that the board of education has authority to dismiss a teacher for certain specified causes, or

for other sufficient cause. Therefore it has the authority to determine other causes for the best interests of the school, and the courts would not interfere except where abuse of discretion is shown."[15]

A court clearly outlined the responsibility of the school board in a 1969 case. "School boards are administrative agencies. As such, they have both rule-making and adjudicative authority. First, they are authorized to make reasonable rules regarding the performance of teachers. Second, they are authorized to determine whether a teacher should be dismissed. These two functions must be carefully separated."[16]

Although a school board has no jurisdiction to hear questions of law, the courts recognize that school boards are the best forum for the resolution of local educational problems.[17] This policy is based on the belief that governing boards of educational institutions have greater expertise than the courts in matters of education. Therefore, the courts have allowed these boards to be the finders of facts regarding dismissals.[18]

Where a statute does not provide for dismissal causes or does so in a general manner, the contract between the board and the teacher is all important. A rural North Dakota teacher's contract provided that she should receive no further compensation should the school be closed because

of the lack of attendance by a specified number of pupils. In February, after the attendance had fallen below the set minimum for some time, she was notified that the school would be closed five days hence, which was accordingly done and the district was annexed by another district. The teacher challenged both the closing of the school and the discontinuance of her wages and took the matter into court. The court, however, found for the board, stating that the law had been observed by that body and that the teacher had no cause for action in the courts.[19]

As a general rule, in absence of statutory authority or provisions in the teaching contract, a school district is not justified in dismissing a teacher without compensation prior to the expiration of the contract, even though the teacher's services are no longer required. In Michigan, there is no express statutory authority for terminating a teacher's contract because of lack of funds. ". . . When it is necessary for a school district to reduce personnel, they are excused from offering a tenured teacher a contract of employment . . . are not excused from honoring a valid contract."[20]

Where a dismissal action is challenged in court, the remedies most commonly sought are reinstatement and damages for breach of contract. It is interesting to note that, in addition, school boards and individual members may be

held personally liable under the tenure laws when they wrongfully exercise ministerial functions.[21]

The case law seems to indicate that it would be unwise for an institution to disguise the removal of an ineffective teacher as a case of financial exigency. If a faculty member is alleged to be incompetent, the case should be fairly proven under procedures which are appropriate to dismissal for cause. Any clouding of the institution's motivation in such a case may lead to trouble.

FOOTNOTES

[1]State v. Board of Education, 7 NW(2d) 544(1942).

[2]Dugas v. Ascension Parish School Board, 81 S(2d) 817(1955).

[3]Board of School Trustees of Gunning Bedford Junior School District No. 53 v. O'Brien, 190 A(2d) 23(1963).

[4]Minnesota Association of Public Schools v. Hanson, 178 NW(2d) 846(1970).

[5]Hensley v. State Board of Education, 376 P(2d) 968 (1962).

[6]Beckett v. Roderick, 251 A(2d) 427(1969).

[7]Board of School Trustees of Gunning Bedford Junior School District No. 53 v. O'Brien, 190 A(2d) 23(1963); Hensley v. State Board of Education, 376 P(2d) 968(1962).

[8]Pickens County Board of Education v. Keasler, 82 S(2d) 197(1955).

[9]Board of School Trustees of Gunning Bedford Junior School District No. 53 v. O'Brien, 190 A(2d) 23(1963).

[10]Williams v. Board of Education, 82 S(2d) 549(1955).

[11]Woods v. Board of Education, 67 S(2d) 840(1953).

[12]Armstead v. Starkville Municipal Separate School District, 461 F(2d) 276(1972).

[13]Welsko v. School Board, etc., 119 A(2d) 43(1956).

[14]Shelton v. Tucker, 364 US 479(1960); Rackley v. School Board District No. 5, 285 F Supp 676(1966).

[15]McLain v. Board of Education of School District No. 52, Carmi, 183 NE(2d) 7(1962).

[16]Lucia v. Duggan, 303 F Supp 112(1969).

[17]Lucas v. Chapman, 430 F(2d) 945(1970).

[18]Yuen v. Board of Education, 222 NE(2d) 570(1966).

[19]Linden School District v. Porter, 130 NW(2d) 76 (1964).

[20]Bruinsma v. Wyoming Public Schools (Michigan), 197 NW(2d) 95(1972).

[21]Babb v. Moore, 374 SW(2d) 516(1964).

VII. SUMMARY AND RECOMMENDATIONS

The research reported in this study is not intended to be used as if it were a legal handbook on how to prepare ironclad dismissal criteria. On the contrary, the design is to illustrate a policy problem that has legal implications and to explain the present status of this issue. We are able, however, to suggest certain general points to which institutional leaders should address themselves as they prepare dismissal criteria.

We recommend the following guidelines:

(1) Know your state tenure law, especially the criteria for the dismissal of faculty.

(2) Know the regulations relative to the dismissal of faculty which have emanated from your state educational agency.

(3) Construct institutional dismissal criteria, inclusive of statutory agency criteria, which are explicitly clear in defining categories of behaviors that are impermissible.

(4) Use rational professional judgment in constructing dismissal criteria. Refer to statements by national educational agencies for professional ethics if necessary.

(5) Construct explicit criteria for the removal of personnel in a case of financial exigency. Do not attempt to disguise the removal of an undesirable faculty member as a case of financial exigency.

(6) Recognize the principles in the recent Perry v. Sinderman and Regents v. Roth cases when constructing dismissal criteria relative to probationary faculty. Be most explicit in defining your contractual relationship.

(7) Be aware of the usual court view against releasing tenured faculty while retaining nontenured faculty in the same academic area.

(8) Consult your institutional attorney to insure that your dismissal criteria are well defined and functional within your state's legal framework.

The Texas and Michigan Surveys

In retrospect, the set of criteria from a Texas institution which seems to embody the most functional characteristics are listed as "n", "o", "p", and "q" on pages 8 and 9. These criteria clearly define behavior impermissible and stress the professional responsibility of the administration in supervising problem faculty. The Michigan criteria listed on pages 13 and 14 compare with the Texas criteria in clarity of expression but do not reflect that

professionalism found in the Texas criteria. All institutions we surveyed, with the exception of these two, have criteria which are sufficiently vague to complicate a termination.

A dismissal case could move from institutional hearings into state or federal courts; in such cases clarity of dismissal criteria and illustration of professionalism in decision-making are most important.

VIII. ANNOTATED BIBLIOGRAPHY

We have prepared the following bibliography from a computer search of ERIC materials. We believe these resources will aid administrators in developing institutional faculty dismissal criteria.

The bibliography contains in chronological order, listing most recent published literature first, an EJ search (the first fifteen titles) and an ED search (the last thirteen titles).

Delon, Floyd G. Substantive Legal Aspects of Teacher Discipline. (Topeka, Kansas: National Organization on Legal Problems of Education), 1972.

The author examines current statutory and case law to determine the present legal restrictions on teacher behavior both in and out of the classroom. The discussion focuses on statutory provisions for teacher discipline and conduct resulting in 1) certificate suspension or revocation, 2) suspension or dismissal, 3) loss of salary, and 4) fines and/or imprisonment. The author concludes that teacher discipline has changed substantially and notes that some of these changes represent significant decreases in the restrictions on teacher conduct. Major contributing factors were 1) legislation and the widespread adoption of collective bargaining in education, 2) court decisions on teachers' rights, and 3) developments in the total social context.

Blackburn, Robert T. Tenure: Aspects of Job Security on the Changing Campus. (Atlanta, Ga.: Southern Regional Education Board), 1972.

This report discusses criticism of academic tenure and examines the literature that supports or refutes these criticisms. The author finds that current tenure practices result in a collective faculty that will age over time and that the percentage of tenured faculty will increase markedly. But he also concludes that studies of faculty adaptability and productivity show that these qualities are not impaired by tenure status. Court decisions affecting tenure and faculty collective bargaining are also briefly discussed.

Vaughan, Jeannette G. The Teacher's Day in Court: Review of 1971. (Washington: National Education Association), 1972.

This report contains digests of 179 court decisions covering legal issues of particular importance to teachers. The case digests are arranged under 1) certification and eligibility, 2) salaries, 3) contracts, 4) tenure, 5) school desegregation, 6) civil rights, 7) teacher/school board negotiation, 8) leaves of absence, 9) liability for pupil injury, and 10) miscellaneous.

Furniss, W. Todd. Faculty Tenure and Contract Systems: Current Practice. (Washington: American Council on Education), 1972.

From a survey designed to determine the current practices involved in faculty tenure and contract systems in colleges and universities in the U.S., it is estimated that 3/4 of faculty members work in institutions that have tenure systems. Further, personnel practices are characterized by 1 or less in annual review of tenure cases. A high rate of the award of tenure after the first review, 2) no limitations on the percentage of tenured faculty, and 3) maximum probationary period ranging from 3 to 7 years.

Bridgeman, Harold J. How to Evaluate Faculty When You Don't Know Much About Them. Improving the Research and Development in Higher Education, 1972.

Although the central purpose of evaluation should be to help a person improve his performance, it appears that most evaluation systems work primarily to reject people. Ignorance often is substituted evaluation of faculty evaluation are all the normal criteria. In which both faculty members prefer the grade for a given activity and 2) relationship between the results given by students or by others. Students, Faculty and Deans. Impact of Student Evaluation of Teaching. Research and Development, 1972.

The author has attempted to study each principal area of significant legal theory in private & public educational administration as well as procedural problems. The study covers the legal aspects of 1) student and school services, 2) students themselves, 3) student activity, 4) curriculum and instructional materials, 5) school personnel, finances and facilities, and 6) the execution of school board authority.

Bridgeman, Thomas E. Evaluation of School Personnel. Speech given before National Association of School Boards Annual Convention (San Francisco, April 1972).

This speech evaluates the legal aspects of the Colorado "Dismissal Act," which governs the evaluation of public school teaching and administrative personnel. The author suggests that the teacher evaluation system that are more open than those the teacher tenure system.

Bunn, Thomas E. Collective Negotiation Rules for School Administrators. (Pamphlet: The National Association of School Personnel, 1972).

This pamphlet, prepared jointly by the National Association of School Administrators and the Council of School Personnel, discusses the role of

teacher associations at the bargaining table. It contains a discussion of the teacher militancy background, some suggestions on how to prepare for negotiations, and a description of the composition and functions of the bargaining team.

Statement on Financial Exigency and Staff Reduction. (Washington: Association of American Colleges), 1971.

Guidelines that may be used in cases where staff reduction due to financial exigency is necessary: 1) administrators and faculty policy groups should consult with colleagues, students, and others in the college community, 2) all pertinent information should be used to support a case of financial exigency, 3) notice of termination must be given for financial compensation to be made, 4) faculty members must be given opportunity to be heard, 5) released faculty member's place must not be filled within two years unless he has been offered reappointment, 6) tenured members should be retained in preference to probationary appointees, 7) early retirement and transfer from full- to part-time service may be acceptable alternatives to termination.

Shulman, Carol H. Collective Bargaining on Campus. (Washington: ERIC Clearinghouse on Higher Education), 1972.

This review of recent literature includes discussion of recent developments in higher education, the impact of collective bargaining on the academic community, professional rights and duties of faculty, and legal problems of collective bargaining. An annotated bibliography of 55 documents concludes the study.

Grievance Administration: Enforcing Teachers' Contract Rights. (Washington: National Education Association), 1971.

This report discusses the alternatives confronting teacher associations when they select a contract grievance procedure and choose an organization for grievance administration. Appendixes include a sample grievance report form, the voluntary labor arbitration rules of the American Arbitration Association, the AAA demand for arbitration form, and the AAA submission to arbitration form.

The Teacher's Day in Court: Review of 1970. (Washington: National Education Association), 1971.

This report contains digests of 143 court decisions published in 1970 concerning legal issues of particular significance to teachers.

Shulman, Carol H. The Tenure Debate. (Washington: ERIC Clearinghouse on Higher Education), 1971.
This review examines recent economic, political, and legal developments that have created pressure for reform of the academic tenure system. At issue are problems of academic freedom, "deadwood" faculty, institutional finances, and the nonrenewal of probationary teachers' contracts.

Shaw, Biswanath. Academic Tenure Policies and Procedures. (Holly Springs, Miss.: Rust College), 1970.
The purpose of this study was to determine the policies for the acquisition and termination of academic tenure and the procedures used to implement these policies in the member institutions of the National Association of State Universities and Land Grant Colleges. Recommendations are presented along with a suggested format for a statement on academic tenure policies and procedures and a list of the institutions that participated in the study.

Case, Chester H. Beyond Evaluation: The Quality Control Model of Evaluation and the Development Model for Faculty Growth and Evaluation.
This paper is the result of dissatisfaction with the basic pattern of evaluation that prevails throughout California. One alternative model introduced in this paper is the development model for faculty growth and evaluation. Speculations are offered on what outcomes could be expected from it.

Van Alstyne, William. "The Supreme Court Speaks to the Untenured: A Comment on Board of Regents v. Roth and Perry v. Sinderman," AAUP Bulletin, 58, 3, 267-278.
Describes two differing Supreme Court rulings concerning procedures for explaining nonrenewal of contract to nontenured professors.

Palmer, Walter H. "Due Process Termination of Untenured Teachers," Journal of Law and Education, 1, 3, 469-485.
A discussion of court cases concerning due process termination of untenured teachers.

Jacobsen, Gene S. "The Dismissal and Non-reemployment of Teachers," Journal of Law and Education, 1, 3, 435-448.
Suggests proper procedures for teacher dismissal and non-reemployment.

Nolte, M. Chester. "And How Hard Is It To Oust a Bad 'Professional' Teacher," American School Board Journal, 159, 12, 21-22.

A teacher need not prove he is competent to keep his job, but a school board must prove he is incompetent in order to get rid of him.

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The question of legal versus moral tenure is examined in a study of state universities and land-grant colleges.

Good, Wallace E. "The Case of the Expectant Professor and Other Mysteries," Nolpe School Law Journal, 2, 1, 3-11.

Discusses court cases grappling with issues concerning faculty members at institutions of higher education, such as their right to continuing employment in the absence of contract or statutory provisions and the extent of their procedural rights in the event of employment termination.

Lieberman, Myron. "The Question of Teacher Evaluation in Negotiations," School Management, 16, 4, 15-16.

This article concerns grievance procedures, negotiation agreements, and teacher evaluation in negotiations.

Soules, Jack A. and Buhl, Lance C. "Reviving Promotion and Tenure: A Systematic Approach," Educational Record, 53, 1, 73-79.

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Lowenfish, Lee. "On Not Being Fired, Just Not Rehired," Change, 3, 8, 52-54.

Untenured college faculty may not have contracts renewed.

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This article relates to the evaluation of faculty when making considerations for nonrenewal.

Davis, John C. "Legal Trends in Teacher Dismissal Procedures," NASSP Bulletin, 55, 359, 49-55.

Teacher surpluses and demands for accountability have led boards of education and administrators to consider the dismissal of teachers not performing as expected. The

author views the situation and urges school officials to heed scrupulously the provisions of the state statutes on teacher dismissal.

Gillis, John W. "Academic Staff Reductions in Response to Financial Exigency," Liberal Education, 57, 3, 364-77.

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Lieberman, Myron. "Will Tenure Decisions Be Subject To Grievance Procedures," School Management, 15, 9, 8-9.

The topics addressed in this article include the significance of teacher associations, the probationary period, and job tenure in grievance procedures.

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